

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BNSF RAILWAY COMPANY,
Plaintiff,
v.
CLARK COUNTY, WASHINGTON;
MITCH NICKOLDS, in his official capacity
as Director of Community Development of
Clark County; KEVIN A. PRIDEMORE, in
his official capacity as Code Enforcement
Coordinator of Clark County; and
RICHARD DAVIAU, in his official
capacity as County Planner of Clark County,
Defendants.

No.: 3:18-cv-5926

**PLAINTIFF BNSF RAILWAY
COMPANY'S MOTION FOR
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION**

Note on Motion Calendar:
November 14, 2018

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1 **I. NOTICE OF MOTION**

2 Please take notice that on November 14, 2018, Plaintiff BNSF Railway Company will
 3 note for hearing this motion for a temporary restraining order against Defendants to prevent
 4 imminent enforcement against BNSF of Clark County land use ordinances that are preempted by
 5 federal law. BNSF will also ask that a hearing on its motion for a preliminary injunction be set
 6 by order of this Court, following a ruling on the motion for a temporary restraining order.

7 **II. INTRODUCTION**

8 Against clear Ninth Circuit precedent, Clark County officials are threatening to force
 9 Plaintiff to comply with the procedural and substantive requirements of a county land use law—
 10 the County Development Code—against a railroad construction project undertaken by Plaintiff
 11 BNSF Railway Company (“BNSF”). Federal rail law preempts those requirements, vesting such
 12 matters exclusively in the federal government. At issue here is BNSF’s upgrade to a stretch of
 13 track between Washougal and Mt. Pleasant in Clark County, which will allow smoother,
 14 continuous movement of trains and reduce wait times at road crossings and stopped trains
 15 throughout the region, including within Clark County.

16 As a common carrier by rail, BNSF is not required to undertake the process to obtain
 17 state, county, or other local permits for rail construction and operations projects like this
 18 Washougal to Mount Pleasant, Washington Double Track Construction Project (“Construction
 19 Project”). Federal law expressly preempts processes under which state and local governments
 20 purport to exercise oversight of such matters. Nor is BNSF subject to the substantive
 21 requirements of state, county, and local land use laws with respect to construction of its railroad.
 22 Nevertheless, Clark County and the officials who administer and enforce the County
 23 Development Code (“Defendants”) insist that BNSF must apply for and obtain a certain county
 24 permit before continuing construction. Defendants and their agents have now repeatedly
 25 threatened to compel BNSF to expend resources on a preempted permitting process, which raises
 26 the prospect of forcing BNSF to stop construction work on part of its interstate rail network and

1 face unknown delays while that misconceived process grinds on.

2 Both the enforcement proceedings themselves and the substantive restrictions Defendants
 3 might ultimately impose on the Construction Project strike at the heart of Congress's plan for
 4 uniform federal regulation of rail carriers and their facilities. Clark County officials have no
 5 more power to superintend, delay, or stymie railroad construction than do officials in any of the
 6 countless other local jurisdictions across the nation that host parts of the interstate rail network.
 7 Because Defendants refuse to heed federal law, and imminently threaten to take action
 8 inconsistent with it, BNSF asks that they be temporarily restrained from taking any action to
 9 compel BNSF to enter into the County Development Code permitting process relating to the
 10 Construction Project, and that this Court's temporary restraining order be converted to a
 11 preliminary injunction after full briefing and hearing.

12 **III. STATEMENT OF FACTS**

13 **A. Statutory and Regulatory Background**

14 **1. Federal Railroad Regulation under the ICC Termination Act**

15 Since the Transportation Act of 1920, 41 Stat. 484, Congress has recognized the need for
 16 unified and exclusive federal administrative regulation of common carriers by rail. Prior to that
 17 time, "regulations . . . by federal and state authorities were frequently conflicting, and often the
 18 enforcement of state measures interfered with, burdened, and destroyed interstate commerce.
 19 Multiple control . . . of matters affecting [interstate rail] transportation had been found
 20 detrimental to the public interest as well as to the carriers. Dominant federal action was
 21 imperatively called for." *Transit Comm'n v. United States*, 289 U.S. 121, 127 (1933). Federal
 22 law continues to guard against the threat of Balkanization of the national rail network by local
 23 regulations, and today, the federal government regulates railroad construction and operations
 24 under the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 ("ICCTA"). ICCTA
 25 grants the federal Surface Transportation Board ("STB") exclusive authority to regulate
 26 numerous aspects of rail facilities and operations. *City of Auburn v. United States*, 154 F.3d

1 1025, 1029 (9th Cir. 1998). The statute vesting exclusive jurisdiction in the STB also contains
 2 an express preemption clause:

3 The Jurisdiction of the [STB] over—

4 (1) the transportation by rail carriers . . . ; and

5 (2) the construction, acquisition, operation, abandonment, or discontinuance of spur,
 6 industrial, team, switching, or side tracks, or facilities

7 is exclusive. Except as otherwise provided in [ICCTA's rail provisions], the remedies
 8 provided under [ICCTA] with respect to regulation of rail transportation are exclusive
 9 and preempt the remedies provided under Federal or State law.

10 49 U.S.C. § 10501(b). “ ‘[T]ransportation’ includes . . . [any] yard, property, facility,
 11 instrumentality, or equipment of any kind related to the movement of passengers or property, or
 12 both, by rail.” 49 U.S.C. § 10102(9). Because the STB’s jurisdiction is exclusive, States and
 13 local governments are categorically forbidden from regulating in these areas. *City of Auburn*,
 14 154 F.3d at 1029–31. “ ‘It is difficult to imagine a broader statement of Congress’s intent to
 15 preempt state regulatory authority over railroad operations.’ ” *Id.* at 1030.

16 Accordingly, as the STB has explained: “Section 10501(b) preemption . . . categorically
 17 prevent[s] states or localities from intruding into matters that are directly regulated by the Board
 18 (e.g., railroad rates, services, construction, and abandonment). It also prevents states or localities
 19 from imposing requirements that, by their nature, could be used to deny a railroad’s ability to
 20 conduct rail operations or proceed with activities that the Board has authorized, such as a
 21 construction or abandonment. Thus, state or local permitting or preclearance requirements,
 22 including building permits, zoning ordinances, and environmental and land use permitting
 23 requirements, are categorically preempted.” *14500 Ltd. LLC—Pet. for Declaratory Order*, FD
 24 35788, 2014 WL 2608812, at *4 (STB June 4, 2014) (citing *City of Auburn*, 154 F.3d at 1029–
 25 31). This Court “owe[s] *Chevron* deference to the STB’s ‘guidance on the scope of ICCTA
 26 preemption.’ ” *BNSF Ry. v. Cal. Dep’t of Tax & Fee Admin.*, 904 F.3d 755, 762 (9th Cir. 2018)
 (quoting *Ass’n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1096 (9th
 Cir. 2010), quoting in turn *DHX, Inc. v. STB*, 501 F.3d 1080, 1086 (9th Cir. 2007)).

2. County Regulation of the Columbia River Gorge National Scenic Area

2 In order to facilitate cooperative regional administration of the Columbia River Gorge,
3 the States of Washington and Oregon have entered into a bi-state compact known as the
4 Columbia River Gorge Compact, codified at RCW § 43.97.015 and ORS § 196.150 (the “Gorge
5 Compact”), covering an area in the vicinity of the Columbia River known as the “Scenic Area,”
6 *see* 16 U.S.C. § 544b(a)(2). The Constitution’s Compact Clause requires that Congress consent
7 to interstate compacts, U.S. Const. Art. I, § 10, cl. 3, an action that it performs by enacting a
8 statute. Here, Congress gave advance consent to the Gorge Compact in the Columbia River
9 Gorge National Scenic Area Act, Pub. L. No. 99-663, 100 Stat. 4274 (1986), codified at 16
10 U.S.C. §§ 544–544p (the “Gorge Act”); *see* 16 U.S.C. §§ 544c(a), 544o(d) (Congress’s consent).

11 Congress provided that its consent was conditional on the inclusion of several provisions
12 in the Gorge Compact. 16 U.S.C. §§ 544c(a), 544o(d). As relevant here, *first*, the Gorge
13 Compact establishes a Columbia River Gorge Commission (“Commission”) under state law,
14 Gorge Compact Art. I.a, which “shall not be considered an agency or instrumentality of the
15 United States for the purpose of any federal law,” 16 U.S.C. § 544c(a)(1)(A). *Second*, under
16 Gorge Compact Article I.a, “the States of Oregon and Washington . . . provide to the
17 Commission, and the counties [including Clark County] under State law the authority to carry
18 out their respective functions and responsibilities,” 16 U.S.C. § 544c(a)(1)(B). *Third*, Oregon,
19 Washington, and counties in the Scenic Area appoint the voting members of the Commission
20 according to the criteria set forth in the Gorge Compact. Gorge Compact Art. II; *see* 16 U.S.C.
21 § 544c(a)(1)(C). *Fourth*, the Commission adopts a management plan for the Scenic Area, *see* 16
22 U.S.C. § 544d, and each county in the Scenic Area (including Clark County) in turn “adopt[s] a
23 land use ordinance consistent with the management plan,” subject to the Commission’s approval,
24 *see* Gorge Compact Art. I.a.2; 16 U.S.C. § 544e(b).

25 Oregon and Washington adopted as state law the conditions on which Congress
26 conditioned its consent. *See* Gorge Compact Art. I.a (giving the Commission “the power and

1 authority to perform all functions and responsibilities in accordance with the provisions of this
 2 compact and of the Columbia River Gorge National Scenic Area Act (the federal Act), which is
 3 incorporated by this specific reference in this agreement”). In turn, because portions of Clark
 4 County are located within the Scenic Area, Clark County has enacted land use ordinances for the
 5 Scenic Area as part of the County Development Code. *See* Clark County Code Chapter 40.240.
 6 In particular, Chapter 40.240 establishes an administrative permitting and preclearance process
 7 for land use within the Scenic Area. “No building, structure or land shall be used and no
 8 building or structure shall be . . . erected, altered or enlarged . . . in the Clark County portion of
 9 the Columbia River Gorge National Scenic Area except for the uses listed in this chapter, when
 10 considered under the applicable procedural and substantive guidelines of this chapter.” Clark
 11 County Code § 40.240.010.B.

12 The County Development Code enacted by Clark County lawmakers is administered by
 13 Clark County officials. In particular, as relevant here, Defendant Mitch Nickolds is the Director
 14 of the Clark County Community Development Department; he is the “Responsible Official” who
 15 interprets, applies, and enforces the provisions of the County Development Code. *See* Clark
 16 County Code § 40.100.050, § 40.100.060, § 40.240.040 *s.v.* “Responsible Official.” Defendants
 17 Kevin Pridemore and Richard Daviau are Defendant Nickolds’ designees for certain enforcement
 18 matters, including those threatened against BNSF.

19 **B. BNSF’s Interstate Rail Operations**

20 BNSF operates one of the largest freight railroad networks in North America, and is one
 21 of seven North American Class I railroads, defined as “having annual carrier operating revenues
 22 of \$250 million or more.” 49 C.F.R. § 1201.1-1; Declaration of Dava Kaitala (“Kaitala Decl.”),
 23 ¶ 3. BNSF serves 28 States in the western two-thirds of the United States, as well as portions of
 24 Canada and key Mexican gateways, with approximately 32,500 route miles. Kaitala Decl., ¶ 3.
 25 BNSF operates three transcontinental routes, over which it moves an average of 1,600 trains per
 26 day and carries more than 500 million tons of freight per year. *Id.*

1 BNSF is one of the nation's top transporters of consumer and industrial goods, including
 2 grain and other agricultural products, low-sulfur coal, petroleum and chemicals, food, and
 3 housing materials. Kaitala Decl., ¶ 4. BNSF's shipments help feed and clothe persons across the
 4 country, and supply and power American homes and businesses every day. *Id.* BNSF also helps
 5 connect local business with the global supply chain, which is especially critical in Washington
 6 State where 40 percent of all jobs are tied to trade. *Id.* Interstate rail is critical to moving our
 7 nation's freight in an efficient and environmentally-friendly manner. *Id.* Any interruption to rail
 8 service along BNSF's tracks would hamper and interfere with interstate commerce. *Id.*

9 **C. BNSF's Railroad Construction Project in Clark County**

10 Over the past five years, BNSF has invested approximately \$940 million to expand,
 11 upgrade and maintain its network in Washington State. Kaitala Decl., ¶ 5. In 2018 alone, BNSF
 12 will expend approximately \$160 million in capital expenditures in Washington State, which will
 13 help keep BNSF's interstate network in optimal condition. *Id.* BNSF's maintenance program in
 14 Washington State for 2018 includes approximately 490 miles of track surfacing, undercutting
 15 work, or both, as well as replacing approximately 40 miles of rail and 230,000 rail ties. *Id.*

16 As part of its work in Washington State, BNSF is upgrading its track between
 17 Washougal, Washington and Mt. Pleasant, Washington. Kaitala Decl., ¶ 6. The relevant track is
 18 on a right-of-way in Clark County within the Scenic Area, on land that BNSF owns in fee
 19 simple. *Id.* As described in a Determination of Non-Significance by the Washington
 20 Department of Ecology, the Construction Project consists of an upgrade to an existing BNSF
 21 mainline track and construction of a second mainline track adjacent to and south of the existing
 22 mainline track for approximately 2.56 miles. Kaitala Decl., Ex. A at 1. BNSF is also upgrading
 23 a mainline track turnout and constructing about 800 feet of additional track. *Id.* There will be a
 24 total of about 10 acres of ground disturbance. *Id.* Construction work will occur within the
 25 existing BNSF right-of-way. *Id.* at 1–2. The additional railroad track will connect existing
 26 sidings for double-track operations, which in turn will allow smoother, continuous movement of

1 trains and reduce wait times at road crossings and stopped trains throughout the region. *Id.* at 2.

2 **D. Defendants' Efforts to Impose the Permit Process**

3 On September 4, 2018, James Lynch, counsel for BNSF in this action, received an email
 4 from Defendant Daviau in which he asserted that a Columbia River Gorge National Scenic Area
 5 permit from Clark County is required for the Construction Project. Declaration of James M.
 6 Lynch (“Lynch Decl.”), ¶ 2; Lynch Decl., Ex. A. After receiving this email, Mr. Lynch
 7 responded first by telephone to Defendant Daviau and then by email to Defendants Daviau and
 8 Pridemore and asserted BNSF’s position that federal law preempts the Clark County regulations
 9 pertaining to the Columbia River Gorge National Scenic Area. Lynch Decl., ¶¶ 2–3; Lynch
 10 Decl., Ex B.

11 On September 20, 2018, Mr. Lynch received another letter, this time from Defendant
 12 Pridemore, notifying BNSF that it was “required to submit the Columbia River Gorge National
 13 Scenic Area permit application within thirty days.” Lynch Decl., ¶ 4; Lynch Decl., Ex. C. After
 14 receiving this letter, Mr. Lynch requested a meeting with Defendant Daviau to continue to
 15 discuss this issue, but Defendant Daviau declined this request and stated that if BNSF did not
 16 intend to submit a permit application “the best course of action is to move forward with [a] Code
 17 Enforcement Notice of Order and hearing.” Lynch Decl., ¶ 5; Lynch Decl., Ex. D.

18 On October 19, 2018, Mr. Lynch had a telephone conversation with Taylor Hallvik,
 19 Deputy Prosecuting Attorney for Clark County, about the Construction Project. During this
 20 conversation, Mr. Lynch again asserted BNSF’s position that federal law preempts the
 21 application to the Construction Project of the Clark County regulations at issue. Lynch Decl. ¶ 6.
 22 During this call, Mr. Hallvik requested that BNSF provide him with a letter by November 2,
 23 2018, outlining BNSF’s legal position on the matter. On October 25, 2018, before the deadline
 24 for the requested letter, Mr. Lynch received an email from Mr. Hallvik asserting that “Clark
 25 County plans to proceed with code enforcement in the near future unless a permit is sought by
 26 BNSF.” Lynch Decl., ¶ 7; Lynch Decl., Ex. E. Mr. Lynch delivered the requested letter on

1 November 2, 2018, Lynch Decl., ¶ 8; Lynch Decl., Ex. F, and engaged in another round of
 2 telephone calls with Clark County officials, Lynch Decl., ¶¶ 9–10. During these conversations,
 3 Mr. Lynch committed to providing Clark County officials with further information regarding
 4 BNSF’s legal position by November 19, 2018. Lynch Decl., ¶ 9. However, despite repeated
 5 requests by Mr. Lynch, Clark County officials would not commit to refrain from following
 6 through on their threatened enforcement action against BNSF while the parties continued
 7 discussions. Lynch Decl., ¶¶ 9–11,

8 BNSF filed this action on November 13, 2018 after these further communications with
 9 Clark County officials yielded no progress towards resolution.

10 **IV. ISSUE STATEMENT**

11 Does ICCTA preempt Clark County’s application of the County Development Code to
 12 BNSF’s Construction Project?

13 **V. ARGUMENT AND AUTHORITY**

14 **A. Standard of Review**

15 Generally, “[a] plaintiff seeking a preliminary injunction must establish that he is likely
 16 to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary
 17 relief, that the balance of equities tips in his favor, and that an injunction is in the public
 18 interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The merits—whether
 19 ICCTA preempts the application of the County Development Code to the Construction Project—
 20 is “the most important” factor. *See Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015).

21 “The standard for issuing a temporary restraining order is identical to the standard for
 22 issuing a preliminary injunction.” *ET Trading, Ltd. v. ClearPlex Direct, LLC*, No. 15-CV-426-
 23 LHK, 2015 WL 913911, at *2 (N.D. Cal. Mar. 2, 2015). To the extent that the analyses differ,
 24 the standard for granting a TRO is more lenient. *See L.A. Unified Sch. Dist. v. U.S. Dist. Ct.*, 650
 25 F.2d 1004, 1008 (9th Cir. 1981) (Ferguson, J., dissenting) (noting that, because a preliminary
 26 injunction entails “more extensive control of the parties” than a TRO, the standard for granting

the former should be “more rigid”).

No material facts bearing on the merits of BNSF’s claim are in dispute here. The preemptive effect of a federal statute is a question of law. *Or. Coast Scenic R.R. v. Oregon Dep’t of State Lands*, 841 F.3d 1069, 1072 (9th Cir. 2016). The scope of the Construction Project is set forth in governmental documents, including in a Determination of Non-Significance by the Washington State Department of Ecology, and is thus undisputed. *See* Kaitala Decl., Ex. A at 1–2. The only question presented here on the merits is legal: whether ICCTA preempts application of the County Development Code to the Construction Project.

B. BNSF Is Highly Likely to Succeed on the Merits of Its Preemption Claim

This case presents a paradigmatic example of federal preemption under ICCTA: A local government insists on applying its land-use permitting and preclearance ordinances to railroad construction that is the exclusive responsibility of the STB. Courts and the STB have consistently rejected such efforts. The only unusual feature in this case is the fact that the relevant aspects of the County Development Code were approved by the bi-state Commission established under the Gorge Compact between Oregon and Washington. But as explained below, any careful examination of the Gorge Compact (and the conditions on which Congress gave its consent to the Compact) reveals that the County Development Code is exactly what it appears to be: a local permitting ordinance, adopted and enforced at the local level—precisely the sort of local interference that Congress forbade in ICCTA.

1. The Construction Project Falls Within the Federal Surface Transportation Board's Statutory Grant of Jurisdiction

For federal preemption to apply under ICCTA, “the activity in question must first fall within the statutory grant of jurisdiction to the Surface Transportation Board” under 49 U.S.C. § 10501(a). *Or. Coast Scenic R.R.*, 841 F.3d at 1072. For the STB to have jurisdiction under § 10501(a), the activity must meet three elements: it must be (1) “transportation” (2) “by a rail carrier” (3) “as part of the interstate rail network.” *Id.* at 1073.

1 The Construction Project meets all three elements. *First*, the Construction Project is
 2 “transportation” as defined under ICCTA. ICCTA broadly defines “transportation” as including
 3 any “property, facility, instrumentality, or equipment of any kind related to the movement of
 4 passengers or property, or both, by rail” as well as “services related to that movement.” 49
 5 U.S.C. § 10102(9). Rail repair work is “transportation” because it involves property,
 6 instrumentalities, and equipment related to the movements of passengers and property by rail and
 7 services related to that movement. *See Or. Coast Scenic R.R.*, 841 F.3d at 1073 (“[t]he parties do
 8 not dispute that the [track] repair work done by Oregon Coast qualifies as ‘transportation’”).

9 *Second*, BNSF is a rail carrier under ICCTA. A “rail carrier” is a “person providing
 10 common carrier railroad transportation for compensation.” 49 U.S.C. § 10102(5). BNSF
 11 undisputedly provides common carrier railroad transportation for compensation; indeed, it
 12 operates one of the largest freight railroad networks in North America.

13 *Third*, and finally, the Construction Project is part of the interstate rail network. ICCTA
 14 does not define what is “part of the interstate rail network,” but the STB has interpreted it
 15 “broadly to include (but not be limited to) facilities that are part of the general system of rail
 16 transportation and are related to the movement of passengers or freight . . . in interstate
 17 commerce.” *DesertXpress Enters., LLC*, FD 34914, 2010 WL 1822102, at *9 (STB May 6,
 18 2010). Further, the STB clarified that “transportation between places in the same state [is]
 19 within the Board’s jurisdiction as long as that transportation [is] related to interstate commerce.”
 20 *Id.*; *see* 49 U.S.C. § 10501(a)(2) & (2)(A) (providing that the STB’s jurisdiction extends “to
 21 transportation [by rail] in the United States between a place in . . . a State and a place in the same
 22 . . . State as part of the interstate rail network”). The Construction Project clearly falls within this
 23 definition. BNSF’s track extends across 28 States for approximately 32,500 route miles. The
 24 stretch of track affected by the Construction Project is connected to BNSF’s interstate rail line
 25 and carries interstate commerce.

2. The ICC Termination Act Preempts Application of the County Development Code to the Construction Project

Once jurisdiction is established under 49 U.S.C. § 10501(a), the broad language of 49 U.S.C. § 10501(b) makes the STB’s jurisdiction exclusive over “transportation by rail carriers” and “construction . . . even if the tracks are located, or intended to be located, entirely within one State.” As explained above, the Construction Project readily falls within the definition of “transportation by rail carrier[]” and “construction.” Accordingly, “the remedies provided under [ICCTA] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b). The enforcement remedies that Defendants are threatening with respect to the Construction Project are exactly the state law “remedies” that ICCTA preempts. *See City of Auburn* 154 F.3d at 1029–31; *Or. Coast Scenic R.R.*, 841 F.3d at 1077 (concluding that environmental regulation that gives a state agency discretion to deny permits required for construction of rail projects is subject to ICCTA preemption).

This result is inevitable where a land use ordinance like the County Development Code is concerned. Courts and the STB have repeatedly found that ICCTA preempts similar state and local land use ordinances. *See, e.g., Green Mountain R.R. v. Vermont*, 404 F.3d 638, 640, 643 (2d Cir. 2005) (holding that a state “environmental land use statute” was preempted under Section 10501(b)); *Friends of the Eel River v. N. Coast R.R. Auth.*, 399 P.3d 37, 43 (Cal. 2017) (“[I]t appears settled that the ICCTA would preempt state regulation in the form of the state’s imposition of environmental preclearance requirements on a privately owned railroad that prevented the railroad from operating.”); *Washington & Idaho R.R.—Pet. for Declaratory Order*, FD 36017, 2017 WL 1037370, at *4, *6 (STB Mar. 15, 2017) (indicating that a “[c]ounty’s zoning ordinances and special use permit process” and “state or local permitting or preclearance requirements, including building permits, zoning ordinances, and environmental and land use permitting requirements are categorically preempted as to any facilities that are an integral part

1 of rail transportation"); *DesertXpress Enters., LLC—Pet. for Declaratory Order*, FD 34914,
 2 2007 WL 1833521, at *3 (STB June 25, 2007) (granting a declaratory order finding that "state
 3 permitting and land use requirements" were preempted under Section 10501(b)).

4 In the Ninth Circuit, *Oregon Coast Scenic Railroad* is recent and illustrative. There, a
 5 rail carrier sought an injunction against the Oregon Department of State Lands arguing that
 6 ICCTA preempted the State from subjecting railroad repair work to its "removal-fill law,"
 7 which, among other things, requires a state permit for the removal of material from [certain]
 8 waters." *Or. Coast Scenic R.R.*, 841 F.3d at 1071. The district court declined to enjoin the
 9 Oregon agency (on the ground that the railroad work was insufficiently related to interstate
 10 commerce). *Id.* The Ninth Circuit reversed, explaining that "[b]ecause the ability to impose
 11 environmental permitting regulations on the railroad can in fact give local authorities the power
 12 to prevent [a carrier] from constructing, acquiring, operating, abandoning, or discontinuing a
 13 line, such a permitting scheme would have the effect of managing or governing rail
 14 transportation." *Id.* at 1077 (internal quotation marks omitted). Thus, the court concluded that
 15 the construction activity fell "squarely within [ICCTA's] preemption provision." *Id.* at 1076.

16 Just as ICCTA preempts the permitting processes in the cases cited above, the land use
 17 permitting process of the County Development Code is preempted by ICCTA as applied to
 18 railroad construction. By threatening to subject the Construction Project to that permitting
 19 process, Clark County asserts the power to prevent BNSF from "constructing, acquiring,
 20 operating, abandoning, or discontinuing a line." That scheme has the impermissible effect of
 21 governing rail transportation that is exclusively within the STB's jurisdiction.

22 **3. The County Development Code Is a Local Law Properly Subject to
 23 ICCTA Preemption**

24 Just like any local ordinance, the County Development Code is preempted in its
 25 application to the Construction Project. Notwithstanding the overlay of the Gorge Compact
 26 (including the Commission and the Commission's management plan for the Scenic Area), the

1 basic principle of ICCTA preemption applies as it always does: Federal law preempts state and
 2 local agencies from exercising regulatory authority over interstate railroads on issues related to
 3 railroad operations. Every relevant layer of land use planning under the Gorge Compact is a
 4 matter of state or local law. The Commission has taken the improbable contrary view—that
 5 county land-use ordinances are federal law, despite the fact that no federal official has any
 6 control over their adoption or enforcement. *See Union Pac. R.R. v. Wasco Cty. Bd. of Comm'rs*,
 7 CRGC NO. COA-16-01 (Sept. 8, 2017). But the Commission’s analysis does not withstand
 8 scrutiny, and this Court should reject it.

9 a. To begin with, the Commission is a bi-state agency established by the States of
 10 Washington and Oregon in the Gorge Compact. Gorge Compact Art. I (“The States of Oregon
 11 and Washington establish by way of this interstate compact a regional agency known as the
 12 Columbia River Gorge Commission.”). As such, the Commission is a state entity, not a federal
 13 one. The Ninth Circuit has held that an entity created by an interstate compact is a state
 14 “compact entity,” rather than a federal agency, when it is “an operational body established by
 15 reciprocal [state] legislation whose effectiveness is conditioned upon binding legislative
 16 commitments by the states.” *Seattle Master Builders Ass’n v. Pac. Nw. Elec. Power &*
 17 *Conservation Planning Council*, 786 F.2d 1359, 1363 (9th Cir. 1986). That standard is
 18 unquestionably satisfied here. The Commission was established by, and draws its authority
 19 from, the Gorge Compact, which is reciprocally enacted into each State’s law. Gorge Compact
 20 Art. I.a; *see* RCW § 43.97.015; ORS § 190.150. And the Commission’s establishment and
 21 powers were made conditional upon both States’ ratification of the Gorge Compact. Gorge
 22 Compact Art. III.

23 Numerous aspects of the Commission’s establishment, composition, and powers confirm
 24 that it is a state entity. The Gorge Act, which sets forth the conditions upon which Congress
 25 consented to the Compact and is incorporated in full into the Gorge Compact, expressly declares
 26 that the Commission is not a federal agency or instrumentality. 16 U.S.C. § 544c(a)(1)(A). The

1 Commission's authority to act arises entirely from the Gorge Compact, which confers on the
 2 Commission the authority under state law to take the actions contemplated by the Gorge Act.
 3 Gorge Compact Art. I.a; *see* RCW § 43.97.015; ORS § 190.150. Consequently, the Commission
 4 “[c]learly[] [acts] under authority of state law.” *Tucker v. Columbia River Gorge Comm'n*, 73
 5 Wash. App. 74, 78 (1994). The Commission's primary functions—to develop land use
 6 designations for nonfederal lands within the Gorge, adopt a land management plan, and review
 7 local land-use ordinances for consistency with the management plan—concern the “regulation of
 8 land use,” which “is traditionally a function performed by local governments.” *Lake Country*
 9 *Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979).

10 The Commissioners are appointed by the Governors of each State, subject to “applicable
 11 State law.” 16 U.S.C. § 544c(a)(1)(C); Gorge Compact Art. II.a. Although the Secretary of
 12 Agriculture appoints one Commissioner, that Commissioner is an “ex officio, nonvoting
 13 member.” 16 U.S.C. § 544c(a)(1)(C)(iv). Thus, the Commission exercises its authorities at the
 14 behest of state officials who are accountable to the States. In addition, the Commission is funded
 15 entirely by Washington and Oregon, which makes it subject to complete state control as a
 16 practical matter. Gorge Compact Art. IV. If the Commission were a federal agency, funding the
 17 agency from local rather than federal sources would be a marked departure from normal practice.
 18 Gen. Accounting Office, *Principles of Federal Appropriations Law*, at 2-26 (4th rev. ed. 2016)
 19 (federal agencies are subject to federal fiscal control); *cf. Fincher v. Fla. Dep't of Labor & Emp't*
 20 *Sec.—Unemployment Appeals Comm'n*, 798 F.2d 1371, 1372 (11th Cir. 1986) (state control over
 21 agency's finances demonstrates that agency is a state entity). Significantly, the Executive
 22 Branch understood the Commission to be a state body at the time of the Gorge Act's enactment:
 23 In signing the Act, President Reagan described the Commission as “State-appointed,” and its
 24 actions as “State action.” 22 Weekly Comp. Pres. Docs. 1576 (Nov. 17, 1986). That state
 25 character had consequences: Because the Commission is a state entity, and its commissioners
 26 are not appointed in accordance with the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2, the

1 President concluded that the Commission could not constitutionally override determinations of
 2 the Secretary of Agriculture to condemn certain property. 22 Weekly Comp. Pres. Docs. 1576.

3 Certainly, the Gorge Compact required congressional approval to become effective, U.S.
 4 Const. Art. I, § 10, cl. 3, and Congress's approval imbued the Gorge Compact with the status of
 5 federal law for purposes of interpretation of the Gorge Compact's terms and preemption of
 6 contrary state laws. *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 628 n.8 (2013). But
 7 it does not follow that the Commission itself is a federal entity or that its actions have the force
 8 and effect of federal law. *See Seattle Master Builders Ass'n*, 786 F.2d at 1363 (rejecting
 9 argument that entity was federal because it was created pursuant to interstate compact and
 10 federal statute giving advance congressional consent). Rather, the Supreme Court has repeatedly
 11 recognized that interstate compacts approved by Congress may create state instrumentalities.
 12 *Lake Country*, 440 U.S. at 401 (an interstate compact may create a state entity, or even "an
 13 agency comparable to a county or municipality"). For instance, the Court held that a materially
 14 identical bi-state compact agency acted "under color of *state* law" for purposes of 42 U.S.C.
 15 § 1983, because the agency "had its genesis" in the compact entered into by the contracting
 16 States, the compact became part of the law of each State, the compact agency's commissioners
 17 were appointed by the States and accountable to the States, the only federal involvement in the
 18 agency took the form of a single nonvoting federally appointed member, and the agency
 19 performed traditionally state-law land-use-related functions. *Lake Country*, 440 U.S. at 399;
 20 *accord Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 45 (1994) (observing that Port
 21 Authority had both state and local characteristics). The Gorge Commission shares all of those
 22 distinctively state characteristics and is therefore a state, rather than federal, entity.

23 **b.** It follows naturally that the land management plan adopted by the Commission
 24 has the force and effect of state law. Pursuant to the Gorge Compact and the Gorge Act, the
 25 Commission is empowered to adopt a land management plan for the non-federal lands in the
 26 Scenic Area. 16 U.S.C. § 544d(c). The Commission must submit the management plan to the

1 Secretary of Agriculture, to permit the Secretary to determine whether he “concur[s]” that the
 2 plan is consistent with the standards set forth in the Gorge Act. 16 U.S.C. § 544d(f). But it is the
 3 *Commission* that has ultimate authority over the content of the management plan because even if
 4 the Secretary declines to concur and suggests modifications to the management plan, the
 5 Commission may “reject the suggested modifications of the Secretary and adopt a management
 6 plan consistent with” the Act. 16 U.S.C. § 544d(f)(3)(B).

7 Because the Commission is not a federal entity, the land management plan that it adopts
 8 is a creature of state law, not federal law. As the Ninth Circuit has recognized in the precise
 9 context presented here—preemption of state and local regulation of rail transportation by
 10 ICCTA—rules promulgated by a non-federal entity have only the force and effect of state law,
 11 not federal law, unless and until they are approved and adopted by a federal agency. *Ass’n of*
 12 *Am. Railroads*, 622 F.3d at 1098 ; *accord Mut. Ins. Co. of Am. v. Royal Appliance Mfg. Co.*, 112
 13 F. App’x 386, 391 (6th Cir. 2004). The Gorge Act expressly provides that the Secretary does *not*
 14 have authority to approve or adopt the land management plan, but merely has the authority to
 15 review the plan and decide whether or not to concur—and the Commission retains ultimate
 16 authority to adopt the plan notwithstanding the Secretary’s disagreement. As a result, the land
 17 management plan does not have the force and effect of federal law.

18 The conditions for judicial review on which Congress gave its consent to the Gorge
 19 Compact confirm that the land management plan is state law. The Gorge Act envisions that
 20 “any” final “action” taken by the Commission to implement the Gorge Act—a category that
 21 presumably includes adoption of the land management plan—may be challenged in the state
 22 courts of Oregon and Washington. 16 U.S.C. § 544m(b)(4), (6). By contrast, actions taken by
 23 the Secretary of Agriculture (none of which is at issue here) are appealable to federal court. 16
 24 U.S.C. § 544m(b)(4)–(5). If the Commission had authority to create federal rules, Congress
 25 would have likewise provided that those federal rules could be challenged in federal court.

26 The Gorge Act’s enactment history and principles of constitutional avoidance reinforce

1 the conclusion that the Commission creates a state law land management plan. As noted above,
 2 the Executive Branch concluded that it would violate the Appointments Clause to permit the
 3 Commission to override decisions of the Secretary of Agriculture with respect to matters of
 4 federal law. Specifically, the Act confers on the Secretary interim authority to designate certain
 5 lands for federal condemnation, but gives the Commission authority to “disapprove” a proposed
 6 federal condemnation action before the Secretary institutes it. 16 U.S.C. § 544h(b)(1). The
 7 ability to override the decisions of a principal officer of the United States with respect to a
 8 federal condemnation action would have, in the Executive Branch’s view, constituted significant
 9 authority pursuant to federal law that would have rendered the commissioners themselves
 10 “officers of the United States” who must be appointed pursuant to the Appointments Clause—
 11 not by state Governors and counties, as the Commission’s members are. 22 Weekly Comp. Pres.
 12 Docs. 1576 (“The Federal Government may not constitutionally be bound by such State action
 13 taken pursuant to Federal law.”); *see Edmond v. United States*, 520 U.S. 651, 662 (1997); *Ass’n
 14 of Am. Railroads. v. U.S. Dep’t of Transp.*, 821 F.3d 19, 36 (D.C. Cir. 2016).

15 Tellingly, the President did *not* object to the Commission’s ability to override the
 16 Secretary’s disagreement with respect to the land management plan. If that plan were a matter of
 17 federal law, the Commission’s authority to overrule the Secretary’s views would have raised the
 18 very same serious constitutional questions as the condemnation-disapproval provision. The
 19 President thus necessarily understood the management plan to be a matter of *state* law—
 20 something within the Commission’s state-conferred regulatory authority. That construction
 21 avoids the serious constitutional questions that otherwise would be present. *See Clark v.
 22 Martinez*, 543 U.S. 371, 380–81 (2005) (“[W]hen deciding which of two plausible statutory
 23 constructions to adopt, a court must consider the necessary consequences of its choice. If one of
 24 them would raise a multitude of constitutional problems, the other should prevail”).

25 **c.** Finally, as most relevant here, county land-use ordinances adopted pursuant to the
 26 Gorge Compact—like the County Development Code—are local laws that do not have the force

1 and effect of federal law. The Gorge Compact provides that counties within the Scenic Area
 2 shall adopt land-use ordinances consistent with the management plan, subject to approval by the
 3 Commission. *See* 16 U.S.C. § 544e(b). Land-use regulations are matters of traditional state
 4 concern that are within the authority of local governments in Washington and Oregon. *See Hess*,
 5 513 U.S. at 44; *see also, e.g.*, RCW § 36.70A.040 (providing for city and county land-use
 6 planning); ORS § 215.050 (granting counties authority to promulgate comprehensive land-use
 7 ordinances). By providing that “counties”—local subdivisions of the States, with local
 8 governing authority—should enact land-use “ordinances,” the Compact and the Act reflect the
 9 States’ and Congress’s recognition of the traditionally local nature of land-use regulation, and
 10 their intent to leave intact that local character. Gorge Compact Art. I.a; 16 U.S.C. § 544e(b); *cf.*
 11 *Tucker*, 73 Wash. App. at 79 (land-use decisions contemplated by the Compact and the Act “are
 12 intended to act locally and, thus, be reviewed as [] any other land use decision”).

13 Because counties are corporate bodies that have authority to enact regulations only with
 14 local force and effect, the county ordinances contemplated by the Gorge Compact and the Gorge
 15 Act are local enactments with the force and effect of local law. And although such ordinances
 16 must be approved by the Commission, the Commission is itself a bi-state entity, and it reviews
 17 the ordinances for consistency with the land management plan, which has the force of state law.
 18 The Gorge Act’s judicial review provisions further confirm that counties’ land-use ordinances
 19 have the force and effect of state law, allowing any person aggrieved by “any land use
 20 ordinance” to challenge the ordinance in the state courts of Oregon or Washington. *See* 16
 21 U.S.C. § 544m(b)(4), (6). If such an ordinance were a matter of federal law, Congress would
 22 have directly provided for federal court jurisdiction over such challenges, rather than
 23 conditioning its consent on the States opening their courts for judicial review.

24 **d.** The Commission has nonetheless concluded that the land management plan and
 25 county land-use ordinances are federal law. *Union Pac. R.R. v. Wasco Cty Bd. of Comm’rs*,
 26 CRGC NO. COA-16-01 (Sept. 8, 2017). The Commission’s analysis is threadbare and unsound.

1 *First*, the Commission analogized the land management plan to “state implementation
 2 plans” (SIPs) that are promulgated under the federal Clean Air Act by States and approved by the
 3 Administrator of the federal Environmental Protection Agency. *Union Pacific* at 15. But SIPs
 4 are accorded the force and effect of federal law only once they are adopted by the
 5 Administrator—and the Ninth Circuit has expressly held that in the absence of such federal
 6 adoption, state-promulgated implementation plans have only the force and effect of state law.
 7 *Ass’n of Am. Railroads*, 622 F.3d at 1098. Under the Gorge Compact, the Commission’s land
 8 management plan need not be approved by the Secretary of Agriculture, and more to the point,
 9 county land-use ordinances are approved *only* by the Commission. That makes all the
 10 difference. Under *Association of American Railroads*, the land management plan and land-use
 11 ordinances remain state law because they are *not* adopted by any federal official.

12 *Second*, the Commission mistakenly believed that federal courts have held that local
 13 regulations promulgated pursuant to an interstate compact have the force and effect of federal
 14 law. *Union Pacific* at 14. But *Rhode Island Fishermen’s Alliance, Inc. v. Rhode Island*
 15 *Department of Environmental Management*, 585 F.3d 42, 49 (1st Cir. 2009), on which the
 16 Commission relied, held nothing of the sort. Instead, the court held only that it had federal-
 17 question jurisdiction over a claim asserting that a “state regulatory scheme” adopted pursuant to
 18 an interstate compact was inconsistent with federal law. The court took as given that the
 19 regulatory scheme was a matter of state law. *Id.* at 50. The Commission also relied on two
 20 district court decisions, but those decisions are contrary to Ninth Circuit precedent, as they held
 21 that local ordinances enacted pursuant to an interstate compact must have the force and effect of
 22 federal law simply because they were enacted pursuant to a “federally authorized regulatory
 23 scheme.” *Lake Tahoe Watercraft Recreation Ass’n v. Tahoe Reg’l Planning Agency*, 24 F. Supp.
 24 2d 1062, 1068 (E.D. Cal. 1998); *Stephans v. Tahoe Reg’l Planning Agency*, 697 F. Supp. 1149,
 25 1152 (D. Nev. 1988). That conclusion is irreconcilable with *Association of American Railroads*,
 26 622 F.3d at 1098, which held that state regulations promulgated pursuant to a federal

environmental law constitute state law unless expressly adopted by a federal official.

Finally, the Commission relied on an Oregon Supreme Court decision holding that the Commission’s construction of the Gorge Act should receive *Chevron* deference. *Union Pacific* at 14 (citing *Friends of the Columbia Gorge v. Columbia River Gorge Comm’n*, 346 Or. 366, 384, 410 (2009)). But that holding predates and is contrary to the Supreme Court’s instruction that an interstate compact agency should receive judicial deference only if the compact expressly so provides. *Alabama v. North Carolina*, 560 U.S. 330, 344 (2010). In other words, interstate compact agencies have no intrinsically federal character that entitles them to *Chevron* deference. Here, the Gorge Compact does not provide that the Commission’s understanding of the Compact or the Gorge Act is entitled to any judicial deference. Nor would there be any logic in this particular case in deferring to an *administrative* resolution of a question quintessentially within *judicial* competence: whether a law is properly regarded as a state law or as a federal law for purposes of preemption analysis under the Supremacy Clause of the federal Constitution. The Commission’s conclusion that land-use ordinances are federal law is contrary to Ninth Circuit and Supreme Court precedent, and this Court should therefore disregard it.

* * *

Because the County Development Code is a local law, not a federal law, it is subject to the consistent holdings of courts and the STB alike that ICCTA preempts local land-use permitting and preclearance laws. BNSF is therefore highly likely—indeed, certain—to prevail on the merits of its claim that the County Development Code cannot be applied to the Construction Project.

C. A Temporary Restraining Order and Preliminary Injunction Are Warranted

Each of the other *Winter* factors discussed below also favors a TRO and preliminary injunction. *See* 555 U.S. at 20.

1. Unless Defendants are restrained from imposing the County Development Code's permitting process on the Construction Project, BNSF is likely to suffer one or more forms of

1 irreparable harm. Allowing Defendants to go forward will put BNSF on the horns of the
 2 dilemma that Congress recognized was detrimental to interstate commerce: either undergo a
 3 local permitting process, or else cease improving the interstate rail network. Neither result is
 4 acceptable under federal law, and each will significantly and irreparably harm BNSF.

5 To be clear, ICCTA reflects Congress's judgment that *the permitting process itself*—
 6 quite apart from its substantive outcome—undermines important federal interests by inflicting
 7 unacceptable harm on both the railroad in question and the interstate rail system more generally.
 8 That is so for two reasons. *First*, such process can impose significant burdens on rail carriers—
 9 and thus interstate commerce as a whole—without furthering any legitimate state interest
 10 because the State cannot, as a substantive matter, ultimately impose any valid permitting
 11 restriction on the affected rail carrier. “[S]tate or local permitting or preclearance requirements,
 12 including . . . zoning ordinances, and environmental and land use permitting requirements, are
 13 categorically preempted as to any facilities that are an integral part of rail transportation” because
 14 49 U.S.C. § 10501(b) “prevents states and localities from imposing requirements that, by their
 15 nature, could be used to deny a rail carrier the ability to conduct rail operations.” *Soo Line R.R.*
 16 *Co.—Pet. for Declaratory Order*, FD 35850, 2014 WL 7330097, at *4 (STB Dec. 22, 2014); *see*
 17 *also Or. Coast Scenic R.R.*, 841 F.3d at 1077 (finding preemption because the ability to impose
 18 permitting regulations “can in fact give local authorities the power to prevent a carrier from . . .
 19 operating . . . a line”); *DesertXpress*, 2007 WL 1833521, at *3 n.4 (identifying such requirements
 20 as “state and local actions [that are] preempted regardless of the context or rationale for the
 21 action”). *Second*, such permitting processes introduce delay that deprives rail carriers, shippers,
 22 and the public at large of the immediate benefits of improved rail facilities. The permitting
 23 process itself “can be time-consuming, allowing a local body to delay construction of railroad
 24 facilities almost indefinitely.” *Green Mountain R.R.*, 404 F.3d at 643. At the same time,
 25 preemption does not turn on the severity of the burden imposed: “[W]hat is preempted here is
 26 the permitting process itself, not the length or outcome of that process in particular cases.” *Id.* at

1 644.

2 Both of those concerns correspond to irreparable harms that BNSF is likely to suffer. If
 3 BNSF is forced to participate in the permitting process, it will expend resources to comply with a
 4 regime that Congress intended to nullify. *See Kaitala Decl.*, ¶ 8 (describing resources that may
 5 be necessary to participate in permitting process). And if the permitting process delays
 6 completion of the Construction Project, that will delay the day when BNSF can realize the
 7 benefits of a more efficient operation with the capacity it needs to serve shippers. *See Kaitala*
 8 *Decl.*, ¶¶ 6, 7 (describing the imperative to upgrade this component of BNSF's network,
 9 particularly to ameliorate the difficulty of moving traffic during the winter months).

10 From ICCTA's perspective, the only thing worse than BNSF subjecting itself to Clark
 11 County's permitting process would be if BNSF was stymied in its development of its interstate
 12 rail network. That would inevitably cost BNSF the business and goodwill of any shippers that
 13 turn to competitors when BNSF cannot meet their needs. *See Kaitala Decl.*, ¶ 7 (describing
 14 business risks to BNSF from inability to complete this and similar projects). Such competitive
 15 disadvantages and loss of goodwill are routinely recognized as irreparable. *See Int'l Franchise*
 16 *Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 411 (9th Cir. 2015) ("A rule putting plaintiffs at a
 17 competitive disadvantage constitutes irreparable harm."); *Am. Trucking Ass'ns, Inc. v. City of*
 18 *L.A.*, 559 F.3d 1046, 1058 (9th Cir. 2009) ("ATA v. LA") (recognizing that loss of goodwill can
 19 constitute irreparable harm).

20 Even if some of these harms—costs of engaging in the permitting process or forgone
 21 business opportunities—could be reduced to dollars and cents, they would remain irreparable
 22 because BNSF may have no way to recover from the County in damages. *See Cent. Valley*
 23 *Chrysler-Plymouth v. Cal. Air Res. Bd.*, No. CV-F-02-5017, 2002 WL 34499459, at *7 (E.D.
 24 Cal. June 11, 2002) (finding irreparable harm in preemption challenge to state regulations "based
 25 on the excessive cost of [regulatory] compliance when coupled with the inability to recoup those
 26 costs"); *see also Am. Trucking Ass'ns, Inc. v. City of L.A.*, No. 08-4920, 2010 WL 4313973, at *3

1 (C.D. Cal. Oct. 25, 2010) (granting injunction pending appeal in preemption challenge to local
 2 regulation “because there is no evidence that [plaintiffs] can recoup their economic losses
 3 through a damage award or by some other means”). The right way to redress the threat of injury
 4 to BNSF is to restrain Defendants from inflicting it in the first place.

5 2. In a case that seeks to vindicate the supremacy of federal law, the equities and the
 6 public interest converge with the merits. “[I]t is clear that it would not be equitable or in the
 7 public’s interest to allow the state to continue to violate the requirements of federal law In
 8 such circumstances, the interest of preserving the Supremacy Clause is paramount.” *Cal.*
 9 *Pharmacists Ass’n v. Maxwell-Jolly*, 563 F.3d 847, 852–53 (9th Cir. 2009), *vacated on other*
 10 *grounds sub nom. Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606 (2012); *see ATA v.*
 11 *LA*, 559 F.3d at 1059–60 (finding district court abused its discretion in determining that a
 12 preliminary injunction against preempted regulation was not in the public interest, explaining
 13 that, “while we do not denigrate the public interest represented by the [governmental agency],
 14 that must be balanced against the public interest represented in Congress’ decision to [enact
 15 preemptive federal law], and the Constitution’s declaration that federal law is to be supreme”);
 16 *Bioganic Safety Brands, Inc. v. Ament*, 174 F. Supp. 2d 1168, 1179 (D. Colo. 2001) (“The public
 17 interest element . . . is satisfied when the injunction seeks to enforce express federal preemption
 18 from state encroachment because Congress has already found that exclusive federal regulation in
 19 such matters is in the public interest.”). Because the merits of BNSF’s preemption claim are
 20 compelling, the balance of equities and public interest likewise strongly support restraining
 21 Defendants from enforcing the County Development Code in violation of federal law.

22 **D. The Court Should Not Require a Bond as a Condition of the TRO**

23 Courts may issue a preliminary injunction or TRO only if the moving party gives security
 24 in an amount the court determines to be proper to pay the costs and damages of any party found
 25 to be wrongfully enjoined or restrained. *See Fed. R. Civ. P. 65(c)*. “The district court retains
 26 discretion as to the amount of security required, if any.” *Diaz v. Brewer*, 656 F.3d 1008, 1015

1 (9th Cir. 2011) (internal quotation marks and citation omitted). The court may “dispense with
 2 the filing of a bond when it concludes there is no realistic likelihood of harm to the defendant
 3 from enjoining his or her conduct.” *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003).

4 No bond is necessary here because there is no realistic likelihood of harm to Clark
 5 County resulting from a temporary restraining order. As discussed above, the application of
 6 Clark County ordinances and code enforcement procedures to the Construction Project is
 7 preempted by federal law. It is not apparent what harm the County could possibly suffer from a
 8 brief delay in taking action it is not permitted under federal law to take in any event. Indeed,
 9 completing the Construction Project would *benefit* Clark County. *See* Kaitala Decl., Ex. A (DNS
 10 describing local benefits of the Construction Project). If the County can articulate any harm,
 11 BNSF would be willing to post an appropriate bond or other security upon entry of a preliminary
 12 injunction. But none is immediately necessary: BNSF and its predecessor railroads have
 13 maintained a continuous physical presence in the judicial district for well over a century. No
 14 reason exists for concern that the County will find itself without adequate security while it is
 15 restrained for a matter of weeks.

16 **VI. CONCLUSION**

17 For the foregoing reasons, the Court should temporarily restrain Defendants from taking
 18 any action to enforce the County Development Code against the Construction Project pending a
 19 hearing, and after a hearing, convert its temporary restraining order to a preliminary injunction.
 20 The Court may wish to consolidate the hearing on the motion for preliminary injunction with the
 21 trial on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2). *See Or. Coast Scenic*
 22 *R.R.*, 841 F.3d at 1071 (noting the district court’s use of such a procedure).*

23 Respectfully submitted.

24
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